Supreme Court of the United States.

No. 23.

THOMAS W. PEIRCE, Appellant,

vs.

The UNITED STATES.

APPEAL FROM COURT OF CLAIMS.

BRIEF OF THE APPELLANT.

BOSTON:
1868.
J. H. EASTBURN'S PRESS.

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DECEMBER TERM, 1868.

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Thomas W. Peirce vs. The United States.

BRIEF OF THE APPELLANTS.

I. ADMISSION OF EVIDENCE.

First. The testimony of William H. Russell, one of the drawers and indorsers of the bills declared upon, so for as it had a tendency to defeat, or impair, the negotiable securities to which he had given credit by his signature as a party, was inadmissible and improperly received by the Court below. (Printed Record, pp. 13, 71, 72.)

Bank of the United States vs. *Dunn*, 6 *Peters*, 57. "It is a well-settled principle that no man who is a party to a negotiable note shall be permitted, by his own testimony, to invalidate it. Having given it the *sanction of his name*, and thereby *added to the value* of the instrument by giving it currency, he shall not be permitted to testify that the note was given for a gambling consideration, or under any other circumstances, which would destroy its validity." (59.)—"The liability of parties to a bill of exchange, or promissory note, has been fixed on certain principles which are essential to the credit and circulation of such paper. These principles originated in the convenience of commercial transactions, and cannot now be departed from."

Bank of the Metropolis vs. *Jones*, 8 *Peters*, 12, 16. "It is a well-settled principle that no person who is a party to a negotiable instrument shall be permitted, by his own testimony, to invalidate it. And

this doctrine is sustained by reason and authority. *If an individual whose name appears upon the face of a negotiable instrument*, either as drawer, indorser, or acceptor, shall be a competent witness to prove facts or circumstances which lessen or destroy its value, before, or at the time he gives it currency, the credit of commercial paper could not be sustained."

United States vs. *Lefler*, 11 *Peters*, 94. In this case the Court recognize its previous decisions, as to negotiable instruments, that no man who is a party to such instruments, should be permitted by his own testimony to invalidate it, and say, "The principle thus settled by this Court goes to the exclusion of such evidence only in regard to negotiable instruments, upon the ground of the currency given to them by the *name of the witness called to impeach their validity.*"

Henderson vs. *Anderson*, 3 *How.* 73. "This Court adheres to the rule, that a party to a negotiable paper, having given it value and currency by the sanction of his name, shall not afterwards invalidate it by showing, upon his own testimony, that the consideration on which it was executed was illegal."

Saltmarsh vs. *Tuthill*, 13 *How.* 229. "In a suit by the indorsee against the indorser of a bill, where the defence was usury, the drawer and drawee were incompetent witnesses, when offered to prove certain facts which when taken in conjunction with certain other facts, to be proved by other witnesses, would invalidate the instrument."

Second. The testimony of Russell, which consisted of his statements before a Committee of Congress as to the supposed abstraction by him of certain Indian Trust Bonds from the Department of the Interior, was erroneously received. The transactions were unkown to the petitioner; were subsequent to his purchase of the bills. Russell was introduced by the defendants as a witness, and it is not competent for them to impeach or discredit his character. The only possible purpose for which the testimony could have been offered. (Printed Record, pp. 21, 71.)

Third. The declarations (testimony) of John B. Floyd, Secretary of the War Department, which were obtained and introduced by an examination of the petitioner, so far as they had any tendency to defeat

or impair the negotiable securities to which he had given his sanction, by his official signature and acceptance, were inadmissible, upon the same reason which excludes the testimony of a party to such instruments who may be personally bound. A right, on the part of the defendants, to examine the petitioner, does not authorize the introduction of testimony, or of facts, which are incompetent and immaterial to the issue. *Cases cited supra.*

Northumberland vs. *Aylesford*, 2 *Ambler*, 545. In which the Court say, "It is a fundamental maxim of law, that no man shall be permitted to qualify his own acts."

A. The fact that Floyd accepted the bills as Secretary of War, and was not personally bound, as a party to the instruments, furnishes no answer to the objection. An indorser discharged, because not notified, cannot be received as a witness to impeach, by his testimony, a negotiable security to which he had given credit by indorsement. Floyd, by his official signature, gave currency to the bills which he accepted.—The principle which excludes the testimony of a party to a negotiable instrument, when offered to impeach its original validity has been adopted because the law will not permit a person who has given currency by his signature, to discredit it by his testimony. The principle applies to a person who puts his name to a note or bill, as an executive officer of the Government. The exclusion is not based upon technical or arbitrary grounds—it proceeds upon principles of right and justice—where the reason applies, the rule applies. Floyd is, within the rule, a party to the bills.

Evans vs. *Edmonds*, 13 *C. B.* 776,—(76, *Com. Law Rep.* 775.) Fraudulent representation by a trustee avoids a deed.

B. The declarations of Floyd, to the petitioner, must be regarded as hearsay, and as such, inadmissible. The matters stated to the petitioner by Floyd are not proved by the mere statement,—their truth should have been shown; the statements to the petitioner were not made upon oath.

C. The declarations are inadmissible because they do not in terms, or by any reasonable intendment, refer to either of the bills declared

upon; they certainly cannot be applied to the bill first described, which was given for supplies. (Printed Record, p. 73, Report, shows the objection.)

Fourth. The contracts of Russell, Majors & Waddell with the War Department were not admissible; they were acts *inter alios*, of which the petitioner had no knowledge; he was not in privity therewith; he was not bound to inquire. (Printed Record, Report, pp. 70, 71.)

Arthurs vs. *Hart*, 17 *How.* 6, 15, 16. "A bona fide holder not bound to inquire as to consideration, and is not bound by the agreements between the drawer and acceptor. In an action upon a bill of exchange by a *bona fide* assignee against the acceptor, it is no defence that the bill was accepted in order to pay for a sugar mill which was defective; that the drawers of the bill had promised to put it in order and that the assignee of the bill know these facts."

Townly vs. *Sumrall*, 2 *Peters*, 182. If the holder knew the drawee had no funds, it is not material, if he took the bill upon the faith of the acceptance.

Brown vs. *Wiley*, 20 *How.* 442. Parol evidence of an understanding between the drawer and payee calculated to vary the terms of the instrument not admissible.

Hoare and Al. vs. *Graham and Al.*, 3 *Camp.* 57. In an action on a bill of exchange or promissory note, the defendant cannot give in evidence a parol agreement entered into when it was drawn, that it should be renewed and payment should not be demanded when it became due.

Renner vs. *The Bank of Columbia*, 9 *Wheat.* 581, 587. "There is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence, to contradict or substantially vary the legal import of a written agreement."

The United States vs. *The Bank of the Metropolis*, 15 *Peters*, 377, sustains the position.

Fifth. The contracts; the testimony of Russell; the declarations of Floyd; were also inadmissible, because the instruments declared upon are bills of exchange, and cannot be controlled or contradicted by the contracts or by the testimony offered.

Cases last cited supra.

II. The instruments declared upon are bills of exchange; they are absolute upon their face for the payment of money, which is not dependent upon any contingency, or upon the existence or sufficiency of a particular fund. They were accepted unconditionally. This proposition, it is submitted, cannot be resisted, if the United States as a sovereignty, had the capacity to become a party to a bill of exchange. In considering the character of the instruments, the question of authority on the part of Floyd does not appertain to the discussion.

The bills set up by the claimant are not, in terms or by implication, *made payable out of a particular fund; a direction to charge* the amount of a draft to a particular person or account does not make it conditional, or contingent.

The request of the drawers to pay was absolute, it was not upon any condition or promise. *The acceptance of the Secretary is absolute.* The authorities, as to the character of the instruments, are conclusive.

The United States vs. *The Bank of the Metropolis*, 15 *Peters*, 377. In this case the bills set up in pleading, which had been unconditionally accepted, were in form identical with those holden by the claimant.

Chitty on Bills, 49, 6 *Edi.* The statement of a particular fund, in a bill of exchange, will not vitiate, if it be inserted merely as a direction to the drawer how to reimburse himself.

McLeod vs. *Snee*, *Lord Raymond*, 1481.

Commissioners of Knox County vs. *Wallace*, 21 *How.* 539, 545. Same principle.

Wells vs. *Brigham*, 6 *Cush.* 6. This was an action of assumpsit, by the plaintiff, as the payee, against the defendant as drawee and

acceptor of a draft drawn by one George Clay, dated the 2d January, 1848, of which the following is a copy:

"MR. BRIGHAM,

"*Dear Sir:*

"You will please pay Elisha Wells $30, which is due me for the two-horse wagon bought last spring, and this shall be your receipt."

Shaw, C. J. The parties are all specially named, the drawer, the drawee, and the payee. The draft is payable at a time fixed, to wit: on demand; on no contingency or condition, but absolute; for a sum certain; out of no special fund, but by the drawee generally. The fact that the draft indicated a debt due to the drawer as the consideration between drawer and drawee, does not make it the less a cash order or draft.

Lowery vs. *Steward*, 3 *Bosworth*, 505.

$500. "Columbus, *March* 1*st*, 1863.

"Messrs. JOHN STEWARD, JR., & CO.

"Please pay to the order of A. H. Lowery the sum of five hundred dollars, on account of 24 bales of cotton, shipped to you as per bill of lading, by steamer Colorado, enclosed to you in letter.

"STRIPPLEMAN & BOYCE."

Woodruff, J. The draft in question was in form a bill of exchange. It was an unconditional order upon the defendants to pay a sum certain therein named to the order of the payee. Although the account to which it should be charged was mentioned, it was not by its terms directed to be paid out of a particular fund. Had it been accepted, it was due immediately, whether the cotton to account of which it was to be charged had been sold or not.

Varner vs. *Nobleborough*, 2 *Greenleaf*, 221. Mellen, C. J. "It has been contended by the plaintiff's counsel that the order, though negotiable *in form* is not so in legal *consideration;* being payable out of a particular fund, viz: the town's money in the treasury. We do not see the force of this objection. The treasurer is requested to pay the amount of the order out of the treasury, where the funds of the town were deposited. This is no more than what is understood in case of all bills. They are to be paid out of funds of the drawer in the hands of the drawee."

Kelley vs. *Mayor, &c., of Brooklyn*, 4 *Hill*, 263. The action was by the plaintiff as indorsee of a written instrument in these words:

"No. 1122. *December* 31, 1836.

"City of Brooklyn, *ss:*

"To the Treasurer of the City of Brooklyn at the Long Island Bank.

"Pay to Alexander Lyon, or order, fifteen hundred dollars for award 7, and charge to Bedford road assessment, &c.

"JON. TROTTER, *Mayor.*"

"A. G. STEVENS, *Clerk.*

"(Indorsed,) ALEXANDER LYON."

Cowen, J. The clause "charge to Bedford road," &c., is a mere direction as to the mode of reimbursement.

Pierson vs. *Dunlop, Cowp.* 571. M'Lintol freighted a ship, of which Nicholl was captain, and Pierson owner, and being unable to pay the freight, drew upon Dunlop & Co., in favor of Nicholl, "*on account of freight*, to be placed to account as per advice."

Pierson afterwards sued Dunlop & Co., as acceptors, and though several objections were taken, yet it was never insisted that this was payable out of a particular fund.

McLeod vs. *Ince., Stra.* 762.

Error of judgment in C. B., wherein the plaintiff declares that A. B. drew a bill of exchange dated 25th May, whereby he requested the defendant one month after date to pay to the plaintiff or order 9*l.* 10*s.* "as my quarterly half-pay, to be due from 27th June to 27th September next by advance;" and the action is against the defendant upon his acceptance.

Per Curiam. The quarterly half-pay is a certain fund——; the mention of half-pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person.

Ellison vs. *Collingridge*, 9 *Man. Gran. & Scott*, 570.

Plaintiff gave in evidence an instrument as follows:

"Marine Department,

"Port of London Sea, Fire, and Life Assurance Company,

"To the Cashier,

"10*th of September*, 1849.

"£500.

"Fifty-three days after date, credit Messrs. Plummer & Co., or order, with the sum of five hundred pounds, claimed per Cleopatra, in cash on account of this corporation. AUGUSTUS COLLINGRIDGE,

"*Managing Director*."

Wilde, C. J. I think that this, on the face of it, is a good bill of exchange. The words "credit in cash" mean "hold at his command" or "pay to him," at the expiration of the specified time, the sum of £500.

Cresswell, J. In construing this instrument, we cannot take into account the existence of cross-claim between the company and the plaintiff.

Haussoullier vs. *Hartsink*, 7 *T. R.* 733.

No. 300. Original Security Bank, London,
35 Cornhill. This 7th day of September, 1797.

£25.

On the 19th day of November next, and after that date, on demand, we promise to pay to ———, or bearer, £25, *being a portion of a value as under deposited in security for the payment hereof*, according to the receipt in our hands. HARTSINK & Co.

The value deposited consisted in titles to property marked $\frac{A}{B}$.

The Court said they were clearly of opinion that though, as between the original parties to the transaction, the payment of the notes was to be carried to a particular account, the defendants were liable on these notes, which were payable at all events.

See, also, to the same point—

Coursin vs. *Ledlie's Admr's*, 31 *Penn.* 506.

Bank of Kentucky vs. *Wier*, 3 *A. K. Marshall*, 184.

Bull vs. *Simms*, 23 *N. Y.* 570.

See, also, *Edwards on Bills*, *p.* 144.

Story on Bills, 4*th Ed.*, *p.* 80, *Sec.* 65. The common form of bills of exchange, states the account to which the bill is to be charged, and whether with or without advice. If the amount is to be put to the account of the drawer, the language usually is, "and put it to my ac-

count;" if the drawee is indebted to the drawer, the language is, "and put it to your account;" if it is a bill drawn on account of a third person, the language is, "and put it to the account of A. B.," (the third person.)

III. The United States as a Sovereignty have authority to enter into any and every contract which the trusts conferred, or the duties imposed, upon them, may require, unless, expressly, or by necessary intendment, prohibited by the Constitution; and, in the absence of a constitutional prohibition, may select the means, by which their trusts and duties are to be performed.

The United States vs. *Mauriee*, 2 *Brock. Rep.* 109–10. In this case, Chief-Justice Marshall said "the United States is a Government, and consequently a body politic and corporate, *capable of attaining the object for which it was created by the means which are necessary for their attainment.* It will certainly require no argument to prove that one of the means by which some of those objects are to be accomplished, is contract; the Government, therefore, is capable of contracting, and its contracts may be made in the name of the United States. The Government acts by its agents. Without entering on the inquiry respecting the limits which may circumscribe the capacity of the United States to contract, I venture to say, it is co-extensive with the duties and powers of Government. *Every contract which subserves to a performance of a duty may be rightfully made.* The manner in which a law shall be executed does not always form a part of it; a power not limited or regulated by the words of the acts has been given by the legislature to the executive to construct fortifications; and large sums of money have been appropriated to the object. It is not, and cannot be denied, that these laws might have been carried into execution by means of contracts; yet there is no act of Congress expressly authorizing the executive to make any contract. It is useless, and it would be tedious, to multiply examples, but many might be given to illustrate the truth of the proposition. It follows, as a necessary consequence, that the duty, and of course, the right to make contracts, may flow from an Act of Congress which does not, in terms, prescribe this duty; the proposition, then, is true, that there is a power to contract in every case where it is necessary to the execution of a public duty."

A. The contracts of the United States must be entered into by the instrumentality of individuals; the principal officers of the several Executive Departments, especially of the State, of the War, and of the Navy, are to a large extent the representatives and agents of the President, and their acts are his acts. In exercising their authority, and in performing the functions of their offices, under statutes, they do not act as agents in the ordinary sense of the term, but as principals under the law.

Burrill vs. *Nahant Bank*, 2 *Met.* 163. The board of directors of a bank is a body recognized by law, and to all purposes of dealing with others constitutes the corporation. They have the general superintendence and active management of all the concerns of the bank. We think they do not exercise a delegated authority, in the sense in which the rule applies to agents and attorneys.

Dunstan vs. *Imperial Gas Light Co.*, 3 *B. & Ad.* 125. The duties of directors are unlike those of servants, they are in fact, those of managers or governors.

B. Whenever the United States become a party to a bill, it must be through the executive branch of the Government.

C. If the executive can use bills under any contingency or state of facts, its judgment as to the existence of the contingency or state of facts upon which the authority may be exercised, is conclusive, and cannot be controlled by any other branch of the Government.

D. Cases in which it appears bills have been used by the Government:

Dugan vs. *United States*, 3 *Wheat.* 172.
United States vs. *Bradley*, 10 *Pet.* 359, 360.
United States vs. *Price*, 2 *Wash.* 460.
Bruce vs. *United States*, 17 *How.* 441.
United States vs. *Jones*, 8 *Pet.* 377–383.
United States vs. *Buchanan*, 8 *How.* 85–102.

E. When the contracts for supplies and transportation for the use of the army were made, that section of the country was in a state of insurrection.

Proclamation of the President, 6 *April* 1858, 11 *Stat. at Large*, 796. Utah declared to be in a state of insurrection.

IV. If the executive branch of the government, acting by the principal officer of one of the executive departments, had authority in the execution of its trusts and duties, to accept bills of exchange, under any circumstances, the petitioner is entitled to recover.

Gelpcke vs. *City of Dubuque*, 1 *Wallace*, 203. Bonds payable to bearer have the qualities of commercial paper. When a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.

A. The acts of the Secretary of War are in all matters appertaining to the War Department the acts of the President, and are to be regarded and respected as such.

Lockington vs. *Smith*, 1 *Peters, C. C. R.* 466. Lockington was arrested as an alien enemy, under an order to the marshal from the Secretary of State. In an action for an assault the plaintiff demurred, on the ground that the Act of Congress of July 6, 1798, only empowers the President to order such arrest. The Court, in an elaborate opinion, overruled the demurrer on the ground that the act of the Secretary of State was the act of the President.

Williams vs. *The United States*, 1 *How.* 290. The Secretary of the Treasury, without the special order of the President, made an advance of money, in the exercise of the authority to give special direction in such matters conferred upon the President by the Act of January 31, 1823. The Court held that the act of the Secretary was the act of the President.

Little vs. *Barreme*, 2 *Cranch*, 170. An Act of Congress of Feb. 9, 1799, empowered the President to give instructions to stop and examine

vessels on the high seas, under certain circumstances. The Court adjudged that the orders of the Secretary of the Navy in this respect were to be deemed orders of the President.

Parker vs. *The United States*. 1 *Pet.* 293. The Court decided that an order of the Secretary of War is a valid execution of the power of the President, to allow double rations under certain circumstances, to officers of the army.

The United States vs. *Eliason*, 16 *Peters*, 302. The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulged through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority.

Wilson vs. *Connell's Lessee*, 13 *Peters*, 498, 512. The power of the President to make military reservations was adjudged to be well executed by the Secretary of War.

United States vs. *Gratiot*, 14 *Peters*, 537. An Act of Congress authorizing the President to lease lead mines is well executed by the Secretary of War, it being presumed he is acting under and for the President. *See also*, *Opinions of Attorney-General*, *Vol.* 7, *p.* 453.

Wilcox vs. *Jackson*, 13 *Pet.* 513. In this case it was holden that the Secretary represents the President.

Rogers vs. *Burlington* 3 *Wallace*, 654. "Power to borrow money for *any* public purpose" gives authority to a municipal corporation to borrow money to aid a railroad company making its road as a way for public travel and transportation: and as a means of borrowing money to accomplish this object. Such municipal corporation may issue its bonds, to be sold by the railway company to raise the money. "Power to issue the bonds being shown, the municipal corporation, as against *bona fide* holders of them for value is estopped to deny that the power was properly executed."

V. John B. Floyd, as Secretary, had authority to contract for supplies and transportation for the army. In the execution of the trusts imposed upon the department it was competent for him to stipulate with a contractor to accept his drafts; to enter into an obligation to pay a sum certain, to a contractor, at a time certain. It was competent for Floyd, after a contractor had upon notice, supplied himself with the means of transportation which had been accepted by the Government, and the trains were ready to start to accept the drafts of the contractor to the amount of 40 or 50 per cent. of the sum which would be due upon the completion of the transportation.

The finding of the Court of Claims, (Rulings No. 2 to 6, inclusive, Record, p. 74,) that the secretary was prohibited from accepting the bills declared upon by the Statute of 31st January, 1823, Ch. 9; the Statute of August 6th, 1846, Ch. 90, the Sub-Treasury Act; the Act of 26th February, 1853, Ch. 81, or by either of them, is erroneous.

1. The secretary had authority under the Constitution (*Con. Art.* 2, *Sec.* 2) as the principal officer of an Executive Department, and under the act by which the War Department was established (1789, *August 7th, Ch.* 7, 1 *Stat. at Large*, 50,) as the representative of the President, to perform the duties enjoined upon or entrusted to him in relation to the army, its supplies and the transportation thereof, using such means and entering into such contracts in the execution of the trusts as he might consider fit and adequate to the purpose to be accomplished.

2. The authority of the secretary to contract in relation to the trusts and duties confided to the War Department, and to adopt such terms and stipulations as he might consider fit and adequate, is deduced from and sustained by statutes passed since the organization of the department.

3. The principal officers of the Executive Department, including the Secretary of War, under the counsel of the law officer of the Government, have exercised the right from the commencement of the Government. This usage has been known to Congress, and has been sanctioned by many acts directing the payment of bills which had been issued, with costs and damages. These payments constitute a holding

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3. The principal officers of the Executive Department, including the Secretary of War, under the counsel of the law officer of the Government, have exercised the right from the commencement of the Government. This usage has been known to Congress, and has been sanctioned by many acts directing the payment of bills which had been issued, with costs and damages. These payments constitute a holding

out of authority. They amount to a legislative recognition of the exercise of the right.

4. The authority of the principal officer of an Executive Department, to accept bills, it is respectfully submitted is *res adjudicata.*

5. The title of the claimant, as the holder, *bona fide*, of the bills declared upon, will be upheld by every intendment which, rightfully or equitably, can be made.—The acts of public officers, *prima facie*, will be regarded as legal; their decisions in matters confided to their discretion are conclusive.

Philadelphia and Trenton R. R. Co. vs. *Stimpson*, 14 *Peters*, 448, 458. It is a presumption of law that all public officers, and especially such high functionaries (the President and the Secretary of State,) perform their proper official duties until the contrary is proved, and where, as in the present case, an act is to be done or patent granted upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act or granted the patent, is *prima facie* evidence that the proofs have been made and were satisfactory. No other tribunal is at liberty to reëxamine or controvert the sufficiency of such proofs, if laid before him when the law has made such officer the proper judge of their sufficiency and competency.

Murray vs. *Hoboken Land Company*, 18 *How.* 284. In this case, in relation to a certain class of cases, the Court say, "it has been repeatedly decided that the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title.

"It is true also, that even in a suit between private persons to try a question of private right, *the action of the executive power, upon a matter committed to its determination by the constitution and laws, is conclusive.*"

CONSTRUCTION OF STATUTES.

The Statutes of the United States, exhibit certain peculiarities which bear upon the construction which is to be given. They are not generally repealed in express terms. They are classified by the subject matter to which they relate, and are continuous in distinct

series. Acts in relation to the Tariff, in relation to frauds upon the Treasury are examples — when intended to bear upon the principal officers of the Executive, they are expressly mentioned, especially the War and the Navy. In prohibitory statutes in relation to officers, the heads of the War and of the Navy are expressly exempted and protected from the prohibition. Many statutes are merely directory.

THE AUTHORITY OF THE SECRETARY IS SUSTAINED BY STATUTES APPLICABLE TO HIS OFFICE.

The Statutes of the United States applicable to the Executive Departments, and especially to the Army and Navy, clearly sustain the position which is taken as to the authority of the Secretary at War. It will appear from these statutes that the secretary is not prohibited or restrained, in terms or by legal intendment, from the use of bills of exchange.

The War Department was established August 7th, 1789, (1 Stat. at Large, 49, Ch. 7,) by statute, which provides that there shall be a principal officer therein to be called the Secretary for the War Department, who shall perform and execute such duties as shall be enjoined on, or entrusted to him by the President. It also provides "that the said principal officer shall conduct the business of the said department, in such manner as the President of the United States shall from time to time order or instruct." This is the original source of the authority of the Secretary, who, as has been shown, represents the President, in relation to the matters of the War Department. A construction was given to the statute soon after its passage. (Hodgson vs. Dexter, 1 Cranch, 345.) In this case, it appears that the Secretary of the War Department took upon lease, *under seal*, a house and lot of ground for the use of the War Department. His authority was sustained upon the ground that it became necessary to provide a War Office. In 1792, May 8, (1 Stat at Large, 279, Ch. 37,) an Act was passed making alterations in the Treasury and War Departments, by which it is provided (Sec. 5,) "that all purchases and contracts for supplying the army with provisions, clothing, supplies in the Quartermaster's Department, military stores, Indian goods, and all other supplies or articles for the use of the Department of War, *be made* by, or under the direction of the Treasury Department." This Act clearly shows, by intendment, that prior to its passage, the War Department

had authority, under the general terms of the Statute of 1789, to make these contracts.

This is also apparent from the Act of 1798, (1 Stat. at Large, 610, Ch. 85, Sec. 3,) which repeals the Act of 1792, and directs that "all purchases and contracts for supplies and services for the military service of the United States, shall be made by, or under the direction of the chief officer of the Department of War." This statute does not point out the terms or conditions of any contract which the secretary may make, but leaves these matters to his discretion.

In 1809, a statute was passed (2 Stat. at Large, 535–6, Ch. 28,) which provides (Sec. 5,) that all purchases and contracts for supplies or services, which are, or may, according to law be made by or under the direction of either the Secretary of the Treasury, *the Secretary of War*, or the Secretary of the Navy, shall be made either by open purchase or by previously advertising for proposals respecting the same. The provision as to advertising is directory; whether it is so or not, is immaterial, as will appear from subsequent statutes; and upon the ground that an innocent holder of a bill of exchange is not bound to inquire whether the secretary has, in this respect, complied with the statute.

In 1813, a statute was passed entitled "An Act, the better to provide for the supplies of the army, &c.," (2 Stat. at Large, 816, Ch. 48,) one object of which was *to provide for the subsistence of the army*, by purchase or contract, or by the use of supplies on hand, "*in all cases where either from any want of contractors, or from any deficiency on their part, or from any other contingency, such measure may be proper and necessary in order to insure the subsistence of the army or any part of it.*"

This is evidence of a clear intent that the subsistence of the army shall not be defeated by the want of contractors, or by an inability on their part to perform their contracts, or from any other contingency or disturbance.

In 1818, a temporary statute was passed, (3 Stat. at Large, 426–7, Ch. 61, Sec. 7,) by which it is provided "that supplies for the army,

unless in particular and urgent cases the Secretary of War should otherwise direct, shall be purchased by contract to be made by the Commissary-General on public notice; *which contract shall be made under such regulations as the Secretary of War shall direct.*" The section referred to, was, on the 23d of January, 1823, (3 Stat. at Large, Ch. 5, p. 721,) and on the 2d March, 1829, (4 Stat. at Large, Ch. 42, p. 360,) severally continued for the period of five years; and on the 3d of March, 1835, until the same should be repealed by Congress.

In 1820 a statute entitled "*An Act in addition to the several Acts for the establishment and regulation of the Treasury, War and Navy Departments*," was passed, (3 Stat. at Large, 567–8, Ch. 52, Sec. 6, May 1st,) which provides, "that no contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfilment; *and excepting also contracts for the subsistence and clothing of the Army or Navy, and contracts by the Quartermaster's Department, which may be made by the Secretaries of those Departments.*"

In 1858 a statute was passed, (11 Stat. at Large, pp. 266, 269, Ch. 25, Sec. 4, May 4th, 1858,) which makes it the duty of the Secretary of War, and of the Navy, to report to Congress, severally, *such contracts as they might make under Sec.* 6 *of the law of* 1820.

In 1860 a statute was passed making certain appropriations, (12 Stat. at Large, pp. 91, 103, Ch. 205, Sec. 3,) which provides, "that all purchases and contracts for supplies, when the public exigencies do not require the immediate delivery of the article, or performance of the service, shall be made by advertising, &c. When immediate delivery or performance is required by the public exigency, the articles or service may be procured by open purchase or contract, at the places and *in the manner* in which such articles are usually bought or sold, or such service engaged *between individuals*. No contract or purchase shall hereafter be made, unless the same be authorized by law, or be under an appropriation adequate to its fulfilment, *except in the War* and Navy Departments, for clothing, *subsistence*, forage, fuel, quarters, or *transportation*, which, however, shall not exceed the necessities of the current year."

The third section of this act was repealed March 2, 1861; but its provisions were re-enacted in the same terms. (12 Stat. at Large, 220, Ch. 84, Sec. 10.)

From these statutes it is clear, that the authority of the Secretary of the War Department to contract may be derived from a special statute without an appropriation, or from an appropriation for a special purpose, or it may be, and in many instances is, exercised under general provisions of law, which confer upon him the management of the business of the department.

The statutes do not prohibit the use of bills of exchange; they do not, expressly, or by implication, prescribe the terms or conditions of the contracts which the Secretary may make; they do, however, confer upon him a large discretion, accompanied with a clear intent, that no casualty or contingency shall be permitted to endanger such subsistence or transportation as the army may require. These provisions are not controlled by statutes which establish and define the Treasury of the United States, or by which the disbursement of the public money is regulated.

VI. The Secretary of War, as the head or principal officer of one of the executive departments, has been held out by Congress as having authority to accept and to use bills of exchange, in the execution of the trusts and duties imposed upon or confided to the department; his exercise of the authority has been, by implication, clearly ratified and confirmed.

STATUTES DIRECTING THE PAYMENT OF BILLS.

In 1833, an Act for the relief of William Tharp, (6 Stat. at Large, 548, Ch. 228,) the Secretary of the Treasury was directed to pay him a sum of money, the balance of a judgment recovered against him as indorser of a protested draft drawn by Lieutenant Reed, including interest and taxable cost.

In 1834, an Act for the relief of Andrew Armstrong, (6 Stat. at Large, 587, Ch. 207,) directed the officers of the treasury to pay the

damages which he had paid on bills drawn by him upon the Secretary of the Navy, which had been protested for non-payment.

In 1835, (4 Stat. at Large, 755, Ch. 27, Sec. 2,) it was declared, "that no allowance shall hereafter be made to any officer in the naval service *for drawing bills*," &c.

In 1836, (6 Stat. at Large, 622, Ch. 13,) the Secretary of the Treasury was directed to pay the damages on drafts drawn by Lieutenant Graham, in favor of Townsly, on George Gibson, Commissary-General of Subsistence, which had been protested and the principal subsequently paid, being for supplies furnished the troops.

In 1846, appropriations were made for expenditures which had been made by certain Commissioners, (9 Stat. at Large, 40, Ch. 65.) In this act it was provided "that bills or drafts which had been drawn or negotiated by said Commissioners, or either of them, on the Commissioner of Indian Affairs, *in pursuance of instructions and authority, given to them*, shall be paid out of said appropriations, holding said Commissioners to a due accountability for the amount of proceeds of said bills or drafts."

In the Act of February 7th, 1857, making appropriations for the Consular and Diplomatic Service, (11 Stat. at Large, 159, 160, Ch. 38,) an appropriation is made for estimated loss by exchange on drafts of Consuls.

In 1859, (11 Stat. at Large, 403, Ch. 75,) a similar provision is made for loss by exchange.

On the 15th of January, 1861, (12 Stat. at Large, Private Acts, p. 878, Ch. 10,) the Secretary of the Treasury was directed to pay to Richard C. Martin a sum of money in full (being the amount) of a lost draft drawn by G. W. Barbour, formerly Indian Commissioner in California, on Reddick McKee, Disbursing Agent, in favor of Thomas W. Lane, for beeves furnished to the Government, which said draft was accepted by said Reddick McKee, and afterwards transferred and delivered to said Martin.

The principle upon which these provisions constitute a legislative recognition of the authority of the heads of departments to accept, and to give instructions for the drawing of bills of exchange, is sustained by the case of *The United States* vs. *Maurice*, 2 *Brock. Rep.* 105, in which Chief-Justice Marshall says, "a legislative recognition of the actually existing regulations of the army must be understood as giving to these regulations the sanction of law."

Postmaster-General vs. *Early*, 12 *Wheat.* 136, 6 *Con. Rep.* 486-7-8. In this case the character and effect of similar legislative sanction and approval of acts and usages of an executive department is discussed.

Ware vs. *United States*, 4 *Wallace*, 633. As to usage and its recognition by Congress.

VII. ***The authority of the Secretary to accept bills of exchange must be regarded as res adjudicata, and concluded by authority.***

The United States vs. *The Bank of the Metropolis*, 15 *Pet. Rep.* 377. This case, (decided in 1841,) concludes the question, unless it can be distinguished, which it is submitted it cannot be, from the case before the Court. The drafts set up in the case cited, by set off, which was allowed to be pleaded, as to their legality and the authority of the officer to accept were put in issue and constituted the subject matter of the contestation.

In this case the Court gave a construction to bills of exchange drawn upon, and by and under the principal officer of an executive department. The Court held that an indorsee for value, of a draft accepted unconditionally by the Postmaster-General, was not bound to inquire as to the state of the accounts between the drawer and the department—that he was not bound to inquire as to the terms and conditions of a contract made by or under the direction of the department, which were not disclosed upon the draft. In this case, (page 392,) it is said:—"Porter's draft was unconditionally accepted. It was discounted by the defendants, upon his indorsement. The bank became the holder of it, for valuable consideration, and its right to charge the United States with the amount cannot be defeated by any equities between the drawer and the Post Office Department, of which the bank had not notice. When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibility of individuals who are parties to such instruments. We know of no difference, except that the United States cannot be sued. From the daily and unavoidable use of commercial

paper by the United States, they are as much interested as the community at large can be, in maintaining these principles." Upon page 393, it is said:—"The want of consideration between the drawer and the acceptor, can be no defence against the right of the indorsee, who gave a valuable consideration for the bill. It does not matter how the drawer's account stood. Whether he was a debtor or creditor of the department; whether the bank knew one or the other. An unconditional acceptance was tendered to it for discount. It was not its duty to inquire how the account stood, or for what purpose the acceptance was made. All it had to look to was the genuineness of the acceptance, and the authority of the officer to give it. The rule is, that a want of consideration between the drawer and acceptor is no defence against the right of a third party, who has given a consideration for the bill, and this, even though the acceptor has been defrauded by the drawer, if that be not known by such third party before he gives value for it."

The Court also considered the effect of drafts made by a contractor upon the Postmaster-General, which had been "*accepted on condition that his contracts be complied with.*" In relation to such drafts it was held, that the condition had reference to a *future* compliance by the drawer and contractor, with his contract, and that prior defaults and forfeitures of the contractor could not be set up against the holder of these drafts. An effort was made to resist the payment of the conditional acceptances, upon the ground that defaults and forfeitures on the part of the contractor had occurred prior to the date of the acceptances, and were at that time proper matters of debit to the drawer. That the holder of the drafts was bound to have inquired into "*the stipulations of the contract and extent of the condition,*"—that he was bound to make an inquiry into the state of the "*contractor's contracts, and his fulfilment of them,*" because the acceptances were conditional. The Court rejected these suggestions, saying, "*that the acceptor held the contracts; he knew, or should have known, officially, the state of the accounts between the contractor and department, at the time he accepted his drafts.*" (See pages 394–400.)

In discussing the question submitted by the Government, as to the duty of the indorsee and holder of the drafts, the Court say, (p. 399,) "We will suppose, however, that the stipulation of Reeside's contracts, and his bond, had been known to the defendants. Might they not

very justifiably have concluded that his drafts were accepted to aid him with an advance to fulfil his engagements? The bond, in evidence, shows that a necessity for advances was contemplated. It had been the habit of the department to make them to contractors. Its exigencies, it is said, required advances to be made."

The principles announced in the case cited, were regarded as the well settled law of the Court, and reference is made in their support to the case of the Bank of the United States vs. Dunn, 6 Peters, 51.

The law established by this decision has been acted upon by the executive departments; by the community; has been recognized and enforced by Congress.

9 *Stat. at Large*, 689–90, 2 *March*, 1847. This statute recites the decision which had been made by the Circuit and by the Supreme Court of the United States, in the case of *The United States* vs. *The Bank of the Metropolis*, and proceeds to make provision for the payment of drafts such as were set up by the defendant bank.

No legislation has since occurred to change the law which had been so established by the Court.

Congress directed the payment with interest of similar drafts which were not before the Court in the case cited.

6 *Stat. at Large*, 848, *Aug.* 1, 1842, *Converse & Rees.*
9 *Stat. at Large*, 153, *Ch.* 34, *Sec.* 4, *March* 2, 1847, *Howland & Aspinwall.*
9 *Stat. at Large*, 677, *Aug.* 10, 1846, *Abraham Horback.*
11 *Stat. at Large*, 496, *Feb.* 10, 1857, *Joseph D. Beers.* (*Navy.*)

Casey vs. *Curtis*, 3 *How.*, 240. "Such was the law as announced from this Court, and Congress must be presumed to have been cognizant of its existence; and as the peculiar power ordained by the Constitution to prescribe rules of right and of action for all officers as well as others falling within the legitimate scope of federal legislation, they must be supposed to have been equally cognizant of the effects and tendencies of this Court's decisions upon the collection of the public revenue. With this knowledge Congress enact, &c.

United States vs. *Bailey*, 9 *Pet.*, 255. The citations from the laws made at the argument establish in the clearest manner a habit of legislation to this effect.

The United States vs. *Tingey*, 5 *Peters*, 127–8. In this case, the Court discussed the validity of a bond voluntarily given and not prescribed by law; in other words, whether the United States have in their political capacity, a right to enter into a contract or to take a bond in cases not previously provided for by some law. The Court say, (page 128,) "upon full consideration of this subject we are of opinion that the United States have such a capacity to enter into contracts. It is in our opinion an incident to the general right of sovereignty; and the United States, being a body politic may, within the sphere of the constitutional powers confided to it, *and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers.* This principle has been acted upon by this Court in the case of Dugan vs. The United States, 3 Wheaton, 172."

Dugan vs. *The United States*, 3 *Wheaton, Rep.* 172. In this case it appears that the United States became the holder as purchaser of a bill of exchange. In speaking of the authority of the treasurer, the Court say, "It is sufficient for the present purpose that he appears to have acted in his official character, and in conjunction with other officers of the treasury. The Court is not bound to presume that he acted otherwise than according to law or those rules which had been established by the proper departments of Government for the transaction of business of this nature."

Tyler vs. *Hand*, 7 *How.* 573, 582, 583. The President may take bonds not prescribed by law. "In point of law, they are valid instruments, though voluntarily given, and not prescribed by law. It is not the case of a bond given contrary to law, or in violation of law, but that of bonds given voluntarily for a consideration expressed in them to a public officer, but not happening to be prescribed by law."

United States vs. *Bradley*, 10 *Peters*, 359, 360. In this case the Court reaffirm the doctrine of the *United States* vs. *Tingey*, 5 *Peters*, 115, and proceed to say:—"From the doctrine here stated we have

not the slightest inclination to depart: on the contrary, from further reflection, we are satisfied that it is founded upon the soundest principles of law and the just interpretation of the Constitution. Upon any other doctrine it would be incompetent for the Government, in many cases, to take any bond or security for debts due to it, or for deposits made of the public money; *or even to enter into contracts for the transfer of its funds from one place to another, for the exigencies of the public service, by negotiable paper or otherwise:* since such an authority is not expressly given by law in a vast variety of cases. *Yet in Dugan* vs. *the United States*, 3 *Wheaton*, 172, *and in the Postmaster-General* vs. *Early*, 12 *Wheaton*, 136, *this right of the Government was treated as unquestionable and belonging to its general functions, as an appropriate incident.*"

United States vs. *Arredondo*, 6 *Peters*, 729. In this case the Court say:—It is an universal principle that where power or jurisdiction is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only question which can arise between an individual claiming a right under the acts done and the public or any person denying its validity are, power in the officer and fraud in the party. All other questions are settled by the decision made or act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for or other revision by some appellate or supervisory tribunal is provided by law."

Decatur vs. *Paulding*, 14 *Peters*, 515. "The duty required by the resolution was to be performed by him (the Secretary of the Navy) as the head of one of the Executive Departments of the Government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. *The head of an Executive Department of Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion.* He must exercise his judgment in expounding the laws and regulations of Congress, under which he is, from time to time, required to act. If he doubts, he has a right to call on the Attorney-General to assist him with his counsel; and it would be difficult to imagine why a legal

adviser was provided by law for the heads of departments, as well as the President, unless their duties were regarded as executive, in which judgment and discretion were to be exercised. If a suit should come before this Court which involved the construction of any of these laws, the Court certainly would not be bound to adopt the construction given by the head of a department, and if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. *The Court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment.*"

United States vs. *Linn*, 15 *Peters*, 314, 317. The Court recognize the discretion of the head of an executive department acting under a general direction contained in a statute in which there are no negative or restraining words.

Brashear vs. *Mason*, 6 *How.* 102. The Court affirm the previous doctrine of the Court, "that the head of an Executive Department of the Government, in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion; *and that the Court could not guide and control his judgment or discretion in matters committed to his care in the ordinary discharge of his official duties.*"

Cotton vs. *The United States*, 11 *How.* 229, 230, 231. The Court say—*in The United States* vs. *The Bank of the Metropolis*, 15 *Peters*, 392—"it was decided that when the United States, by their authorized agents, become a party to negotiable paper, they have all the rights *and incur all the responsibilities* of other persons who are parties to such instruments."

Parks vs. *Ross*, 11 *How.* 374. "An agent who contracts in the name of his principal is not liable to a suit on such contract, much less a public officer acting for his Government. As regards him, the rule is that he is not responsible on any contract he may make in that capacity; and whenever his contract or engagement is connected with a subject fairly within the scope of his authority, it shall be intended to have been made officially and in his public character, (unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable.")

Neilson vs. *Lagow*, 12 *How.* 98, 107–8. In this case the Court considered a statute which says "that no land shall be purchased on account of the United States except under a law authorizing such purchase." In this case, a conveyance of land for the benefit of the United States, made as security for a debt, was upheld. The Court recognized the principle of former decisions, which had established the capacity of the United States to enter into contracts through the instrumentality of the proper department *when not prohibited by law, although not required to do so by any legislative act.*

The United States vs. *Guthrie*, 17 *How.* 303, 304. "Wherever the right of judgment or decision exists in him, (an executive officer,) it is he and not the courts who can regulate its exercise."

The United States vs. *McDaniel*, 7 *Pet.* 14. "A practical knowledge of the action of any one of the great Departments of the Government, must convince every person that the head of a Department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; *but it does not follow that he must show a statutory authority for everything he does. No government could be administered on such principles.* The attempt to regulate by law the minute movements of every part of the complicated machinery of Government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out and limitations imposed on the exercise of its power, there are numberless things which must be done that can neither be anticipated nor defined and which are essential to the proper action of the Government. *Hence of necessity, usages have been established in every Department of the Government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits;* and no change of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions."

Hodgson vs. *Dexter*, 1 *Cranch*, 345. The Court must have given a construction to the act by which the War Department was established, (1789, August 7, Ch. 7, 1 Stat. at Large, 50,) and also of a statute

by which the President was authorized and directed to have the public offices removed to Washington. In this case the authority of the two officers to which reference is made, was deduced and recognized under general terms imposing certain duties. They selected the means.

The United States vs. *Jones*, 8 *Peters*, 377, 378, 379, 381–2–3. In this case it appears that a contractor with the War Department undertook to furnish supplies to the troops within the Mississippi territory, that he made drafts which were negotiated, and subsequently paid by the Department, and the United States claimed a credit therefor, which was disallowed, because the originals or a certified copy thereof, from the Department, were not produced. It was not contended by the Government or the contractor, or suggested by the Court that the drafts were illegal. In the course of the opinion the Court say: "The execution of bills of exchange and orders for money, though they may be connected with the settlement of an account, cannot be officially known to the accounting officers. In such case, however, provision has been made by law by which such instruments are made evidence, without proof of the handwriting of the drawer."

The United States vs. *Jones*, 18 *How.* 92, 95. In this case the Secretary of the Navy remitted money to a Lieutenant abroad, to be expended by him for medical expenses attending an injury which he had received. The accounting officer disallowed the charges made for the expenditure. In this case the Court say: "The Secretary of the Navy represents the President and exercises his power on subjects confided to his department. His acts and decisions on subjects submitted to his jurisdiction and control by the Constitution and Laws, do not require the approval of any officer of another department to make them valid and conclusive. The accounting officers of the treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments." The Attorney-General in his opinion relied upon two statutes as controlling the power of the Secretary, which were not considered by the Court sufficient for that purpose.

(These statutes were passed January 31, 1823. 3 Stat. at Large, 723, and 3d March, 1835. 4 Stat. at Large, 755, 757.)

The result of the adjudications, it is submitted, is, that the United States, as a body politic, may enter into any and all contracts which may be required in the performance of the trusts confided, and in the execution of the duties imposed. As such body politic they can act only through agents, some of which are general, although including, severally, within their agencies, only particular branches of the public business. The principal officers of the different executive departments exercise an authority which in its character, to some extent, may well be compared to the capacity which a principal exercises in the management of his business. These departments are, in many instances, entrusted with a wide discretion, without which a performance of their duties with safety or advantage to the public, would be difficult, if not altogether impracticable. All the contingencies which may arise, in the execution of the duties which appertain to the departments, cannot be anticipated or defined in any statute. It is equally true that some of the provisions of the statutes which are applicable to the departments are directory. Whenever a contract is made by the principal officer of a department, in relation to a subject matter, confided to his charge, the contract is, in the first instance, presumed to have been within his authority. The Secretary of the War Department is charged with trusts and duties, in the performance of which the public have a deep interest; he may be compelled in their execution to exercise a large discretion as to the means to be employed. In the exercise of his general authority, unless restrained by an express provision, or by a clear intendment of law, he may in his discretion, adopt any means which are reasonably fit for, and adequate to the accomplishment of the purpose sought. The Secretary of War, in the language of the Supreme Court, (*The United States* vs. *Eliason*, 16 *Pet.* 302,) is the regular constitutional organ of the President for the administration of the military establishment of the nation.

Whenever the United States, by its agent duly authorized, shall have entered into a contract, their obligations and rights under such contract, are to be ascertained upon the principles which would be applicable to a similar contract of an individual. In this respect there is not, and cannot be, any difference, so far as the legal right or obligation is involved, between a contract of the government and a similar contract of an individual. The only difference which can exist, is found in the extent of the remedy. An individual may be sued upon

his contract; the United States can be sued only with their consent. These principles have an important bearing upon, and may well be considered conclusive, of the correctness of the position that the Secretary of the War Department, in making contracts for supplies and transportation for the use of the army, may in the exercise of the discretion confided to him, agree to pay a sum certain, at a time certain, to the order of a contractor, the payment of which shall not be made to depend upon a previous performance by the contractor, of his undertaking. This position cannot be resisted, unless there is some express provision, or clear intendment of law, restraining, in this respect, the discretion of the Secretary. The possibility that the principal officer of a department may abuse, or fraudulently exercise the discretion with which he may be untrusted, does not diminish or destroy such discretion.

Rex. vs. *The Mayor, &c., of London*, 3 *Barn. & Ad.* 255. In this case, Lord Tenterden speaking of the argument derived from the supposed abuse of an authority, replied, "It is said that it (the power) is liable to abuse. The answer to that is that there can be no ordinance by charter, no ordinance by statute, no ordinance by any human tribunal or human authority, which may not peradventure be abused and applied occasionally to the furtherance of improper objects; but if it were held that because a power might be abused, it therefore could not legally exist; such a judgment would go to destroy almost every power which exists in this or any other country."

The Bank of the United States vs. *The United States*, 2 *How.* 711. (Appendix 745, opinion of Chief-Justice Taney, given as Attorney-General.) *Same case*, 5 *Howard*, 382.

So far as applicable this case sustains the claim of the petitioner. It was a question of damages, and the Court held that Governments do not draw upon each other by bills of exchange; that their intercourse is by the correspondence of their several Ministers for Foreign Affairs. The decision was influenced by the fact the bank was the fiscal agent of the Government, and acted as such in remitting the bills. There is no intimation that the United States could not become party to a bill.

A. The authority of the secretary to accept and to use bills of exchange, has, from time to time, been sustained by the law officers of the Government.

OPINIONS OF THE ATTORNEY-GENERAL.

Hon. R. B. Taney, 23d March, 1832, 2 vol. 505. Hon. H. S. Legare, Sept. 12, 1842, 4 vol. 90, in which he refers to the case of the United States vs. The Bank of the Metropolis, 15 Peters, 377. Hon. John Nelson, Dec. 26, 1843, 4 vol. 296–7, Dec. 30, 4 vol. 299, in which reference is made to the same case. Hon. John Y. Mason, July 20th, August 8th, 1846, 4 vol. 507, 518. Hon. Reverdy Johnson, Dec. 6th, 1849, 5th vol. 218. Hon. Caleb Cushing, July 10th, 1856, 8 vol. 1.

These opinions are entitled to consideration insomuch as the principal officers of the executive departments must, in the first instance, refer to them for advice.

VIII. The statutes relied upon by the Government and by the Court of Claims, are not applicable, and cannot control the cases or principles upon which the petitioner rests his case.

ACT OF 1853, FEBRUARY 26, CH. 81.

In 1846, July 29, Ch. 66, "An Act in relation to the payment of claims," was passed, which provides that claims allowed by Congress shall not be paid to any person except the claimant, his executor, administrator, or duly constituted attorney. The warrant of attorney to be acknowledged and executed in the presence of the two witnesses.

The object of this statute was that money allowed by Congress should be paid to those entitled, and not to those who had assisted to procure its allowance. The act did not accomplish the object, and the Statute of 1853 was passed. It is entitled "An Act to prevent frauds upon the Treasury of the United States." It provides that all transfers and assignments of any claim upon the United States, or any part or share thereof, absolute or conditional, and all warrants of attorney for receiv-

ing payment of any such claim, or any part or share thereof, or interest therein, shall be null and void, unless executed in presence of two witnesses, after the allowance of such claim, the ascertainment of the amount due and the issuing of the warrant for the payment thereof.

The act provides that if any officer of the United States, or person holding any office of trust or profit, &c., shall act as agent in prosecuting a claim, or shall aid or assist, except in the discharge of his official duties, or shall receive any gratuity, or interest in any claim, from any claimant, with intent to aid or assist in its prosecution, he shall be guilty of a misdemeanor. Similar provision is made in relation to senators and representatives. The act imposes penalties for bribery. It provides that the act, and the previous act of 1846, shall extend to all claims, whether allowed by special acts of Congress, or arising under general laws or treaties, or in any other manner whatever.

1. The objection taken and the ruling of the Court upon this statute does not apply to the merits; to the character, or validity of the bills. In considering the statute it must be conceded that the petitioner is the holder of the bills which he brings into Court. In contemplation of law they are payable to him as the original holder. They had existence as contracts by the indorsement and delivery. The petitioner is not within the letter or intendment of the statute, an assignee. His title is not by an assignment in whole or in part, of a claim of the character of those mentioned in the statute. The objection is as applicable to the bonds and coupons recently issued by the Government, as it can be to bills of exchange, which pass by indorsement, and under a blank indorsement by delivery.

Story Bills of Exchange, Sec. 35. Bill payable to the order of the drawer; if he indorses it, the indorsee, in effect, becomes the payee, in lieu of the drawer.

Bank of Kentucky vs. *Wister*, 2 *Pet.* 318. A note payable to bearer is payable to anybody, and is not affected by the disability of the nominal payee.

Hooper vs. *Williams* 2 *W. H. & G.* 13. Declaration upon a note described as payable to bearer. A note payable to the order of the

maker was produced in evidence. Objection on the ground of variance. The Court held that the instrument was not available as a note until indorsed; and by the blank indorsement it became a note payable to the bearer at its inception as a contract, and was correctly described as a note payable to the bearer.

Bayley on Bills, 396–7.—6 Lon. Ed.

Murray vs. *Lardner*, 2 *Wallace*, 110. "Coupon bonds of the ordinary kind, payable to bearer, pass by delivery."

The proposition relied upon in objection, is that the petitioner is the holder of unliquidated claims, not adjusted; no warrant has been issued for their payment; they have been assigned by an instrument not executed in the presence of two witnesses; not acknowledged. The bills declared upon are not in any sense claims of this description. They are not, even if they had passed through several hands by delivery, or by special indorsement. The claims described in the statute, do not by assignment confer upon the assignee a right of action, at law, in his own name. He must use the name of the assignor. The statute refers to claims which may arise under special acts of Congress, under general laws or treaties, or in any other manner whatever. Upon familiar and well settled principles of construction, these last words do not extend or enlarge the prior language. The purpose of the statute does not require an extension, or application, of the words to bills of exchange. Such instruments were not in the mind of the law maker. The general words, used at the close, refer to claims of the same character as those previously specified. The great purpose of the act was to prevent bribery, and to exclude members of Congress from becoming contractors, or having an interest in the contracts of the Government. This is evident from the statute, and from the previous Act of 1846.

2. The Act of 1853 was not designed to limit or restrain the authority of the president, or of the principal officers of the several executive departments to contract, or to prohibit the use of bills of exchange, or to change the legal effect of such instruments.

It cannot, with propriety, be urged that the *Statute of February* 26, 1853, was intended as a repeal or modification of the Acts applicable to the War Department, including those of 1813, 1818 and 1820, to which reference has been made.

The title, the general purpose, and especially sections one and seven of the act, demonstrate very clearly that the act was not designed to control the legal capacity of the Secretary of War, or of the Navy, to enter into such contracts as they had been accustomed and were authorized to make, under the statutes to which reference has been made. The statute was enacted with another intent.

Wood vs. *The United States*, 16 *Pet.* 342. *McCool* vs. *Smith*, 1 *Black.* 459. In these cases repeal of statutes is discussed.

Neilson vs. *Lagow*, 12 *How.* 98, 107–8. In this case the Court considered a statute which says "that no land shall be purchased on account of the United States except under a law authorizing such purchase." In this case, a conveyance of land for the benefit of the United States, made as security for a debt, was upheld. The Court recognized the principle of former decisions, which had established the capacity of the United States to enter into contracts through the instrumentality of the proper department *when not prohibited by law, although not required to do so by any legislative act.*

Converse vs. *The United States*, 21 *How.* 471–3–4. "This provision is in the annual appropriation for the army, &c.—and although the words are general and include officers in every branch, yet from the object of the law, the attention of Congress must have been mainly directed to officers in the military service, *who, from the position in which unforeseen events often place them, are called upon and are required to perform duties not specified by law or regulation*, but which grow out of and are associated with military service. The secretary is not bound to employ collectors of customs. He had a right, if he supposed the public interest required it, to have the service performed by a single agent. The law authorizes him to call upon the collectors; it evidently authorizes him to employ others. He was at liberty to employ a different agency whenever he supposed the public would be better served by this arrangement."

The United States vs. *The City Bank of Columbus*, 21 *How.* 365–6. "The Secretary of the Treasury has power to contract for the transmission of money from one point to another. Such power in the Secretary of the Treasury is necessary for the transaction of the business of the country, pervading as it does every part of the country."

This case was decided in 1858, upon a contract made in 1850, which was subsequent to the Act of 1846, of which the Act of 1853 is in addition, adopting terms more stringent than the former.

By a statute passed in 1858, the Secretary of War, and of the Navy, were required to report to Congress the contracts which they severally might make under the sixth section of the law of 1820, Ch. 52.

3. Bills of exchange have been made since the Act of 1846, and since the Act of 1853, which have been paid by direction of Congress.

4. The United States may become, in the course of its operations, the holders and owners of bills of exchange and other negotiable securities, which they may find it convenient to negotiate. They can do this most certainly without making an assignment, in the presence of two witnesses, with an acknowledgment before some officer. The same principle is applicable to the coupons issued by the Government, with equal force.

This is not answered by saying the United States are not bound by the act, because not named. If they are not bound, the party to whom they may negotiate a bill is not bound, and he may indorse without two witnesses, &c.

ACT OF 1846, AUGUST 6, CH. 90.

Is commonly known as the Sub-Treasury Act. It provides for the better organization of the treasury, and for the collection, safe keeping, transfer and disbursement of the public revenue. The act does not prescribe rules for the Secretary of War, it does not attempt to define or diminish his power to contract for supplies and transportation. By the sixteenth section, disbursing officers are required to keep an accurate entry of each sum received and of each payment or transfer. The nineteenth section requires payments by the United States to be made in gold or silver, or in treasury notes, if the creditor will receive them. Under section twenty-one the Secretary is required to make regulations for the speedy presentation of all government drafts, and in default of presentation, to direct any other mode or place of payment he may think proper, to guard as far as may be, against those drafts being used or thrown into circulation as a paper currency, or medium

of exchange; he shall not sell treasury notes, drafts, warrant or other public security for a premium, without making return of the premium. The sixth section of the act shows that the statute was not intended to obstruct or interfere in any manner, with the authority of the several executive departments, to make their warrants for the payment of money.

Notwithstanding any provision or purpose contained or disclosed in this act, the Secretary at War may accept bills and when due draw the money for their payment.

The Court below erred in its construction of the Act of Jan. 31, 1823, *Ch.* 52.

This objection to the right of recovery by the petitioner cannot avail, unless it is competent for the defendants to contradict the terms and legal effect of the bills declared upon. If competent, the testimony must come from some source other than a party to the bills. It must also be shown that the Secretary, as the representative of the President, or by virtue of his authority to contract, could not agree with a contractor for transportation for the use of the army, to make him an advance of money, or to accept his drafts in part payment of the contract price, after he had procured teams, which had been accepted by the Government, and was ready to commence the transportation, and at a time when the season of the year was unfavorable, contracts very large; no contractors to be found who had money sufficient to make the necessary outlay and perform the service as promptly as it should be done.

The stipulation of the Secretary, contained in the contracts produced by the Government, that the contractor shall be paid pro rata, as his train advances, a common stipulation in the contracts of the Government, must stand upon the same principle as an agreement to pay when the teams have been provided and are in readiness to start. An agreement to pay damage resulting from a non-use of the teams, which the contractor upon notice has provided, is of the same character.

1. There has not been an advance of money. The bills import that the money for which they were drawn was due, payable at a future

day. They cannot be contradicted or varied by parol, unless fraud has been established, to which the petitioner was party or privy at the time he discounted the bills. Of such fraud there is no proof.

An acceptance of a bill of exchange, by the Secretary of War, is not an advance of money. There is no proof that the amount of the bills, was not due at their maturity; this excludes the theory of an indirect, or resulting advance of money by their use. There is no proof in the record from which it can judicially be said, that the specific bills declared upon, were not for services which had been performed.

2. Payment by the Secretary of War, to a contractor, after his teams have been prepared and loaded, ready to commence the transportation, under the circumstances which have been shown in this case, by the testimony produced and relied upon by the defendants, is not an advance of money within the letter or spirit of the act.

It might, with equal propriety, be urged that the Secretary cannot contract to pay, *pro rata*, as the transit progresses from one military post to another.

The acceptances for supplies, so far as appears in proof, were not given until they had been furnished.

The statements of Floyd to the petitioner referred only to transportation.

3. The Statute of January 31, 1823, was not intended to diminish or control the authority or discretion of the President, or of the Secretary, in relation to the contracts, or the terms thereof, which the exigencies of the department might require.

This is evident from the detailed provisions of the statute. It was enacted with a different intent. It is directory in its character, and applicable only to the subordinate disbursing officers—although the principal officers of the several executive departments have the control of the payments required in the execution of their offices, and have authority to draw warrants for money, they are not, in the ordinary sense of the terms, to be regarded as mere disbursing officers. The act is entitled "An Act concerning the disbursement of public money."

The first section says "no advance of public money shall be made in any case whatever; but in all cases of contracts for the performance of any service, or the delivery of articles of any description for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment; *Provided*, that it shall be lawful, under the especial direction of the President, to make such advances, to the *disbursing officers* of the Government as may be necessary for the faithful and prompt discharge of their respective duties, and to the fulfilment of the public engagements. *Provided*, also, the President may direct such advances, as he may deem necessary and proper, to such persons, in the military and naval service, as may be employed on distant stations, where the discharge of the pay and emoluments, to which they may be entitled, cannot be regularly effected."

Section 2. "Officers or agents of the United States to account quarter-yearly."

The statute provides, section third, "that every officer or agent of the United States, who shall offend against the provisions of the preceding sections, *shall, by the officer charged with the direction of the department to which such offending officer is responsible, be reported to the President.*" It also provides, that such offending officer may be dismissed. The fourth section provides, "that no security given to, or obligation entered into with the Government shall be in any wise impaired by the dismissing any officer, or from failure of the President to dismiss any officer under the provisions of this act."

The provisions of this statute clearly show that it was not intended to restrict, or control, or limit the authority of the principal officers of the executive departments to contract, upon such terms as the duties entrusted to them should require. The statute in terms shows an intention that *the fulfilment of the public engagements* shall not be defeated or delayed; that an advance of money may be made by the President to secure their performance. It may also be urged with much force, that contractors for supplies and transportation for the army, upon a distant field of operations, are persons employed in the military service. The provisions of the act, are entitled to receive a liberal, and, if required, an enlarged construction, so that the public service and its exigencies

may be sustained. The act cannot be regarded as a repeal of the Statutes of 1818 and 1820, upon which the petitioner relies, with intent to show a studious and constant care on the part of Congress that the War and Navy Departments should be unfettered in their capacity to contract.

In 1818, a temporary statute was passed, (3 Stat. at Large, 426–7, Ch. 61, Sec. 7,) by which it is provided "that supplies for the army, *unless in particular and urgent cases the Secretary of War should otherwise direct*, shall be purchased by contract to be made by the Commissary-General on public notice; *which contract shall be made under such regulations as the Secretary of War shall direct.*" The section referred to, was, on the 23d of January, 1823, (3 Stat. at Large, Ch. 5, p. 721,) and on the 2d March, 1829, (4 Stat. at Large, Ch. 42, p. 360,) severally continued for the period of five years; and on the 3d of March, 1835, until the same should be repealed by Congress.

In 1820 a statute entitled "*An Act in addition to the several Acts for the establishment and regulation of the Treasury, War and Navy Departments,*" was passed, (3 Stat. at Large, 567–8, Ch. 52, Sec. 6, May 1st,) which provides, "that no contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfilment; *and excepting also contracts for the subsistence and clothing of the Army or Navy, and contracts by the Quartermaster's Department, which may be made by the Secretaries of those Departments.*"

In 1858 a statute was passed, (11 Stat. at Large, pp. 266, 269, Ch. 25, Sec. 4, May 4th, 1858,) which makes it the duty of the Secretary of War, and of the Navy, to report to Congress, severally, such contracts as they might make under Sec. 6, of the law of 1820.

The statutes of 1818 and of 1820, notwithstanding the Statute of January 31, 1823, were in full force when the contracts with Russell, Majors & Waddell were made, and when the bills declared upon were accepted.

The statute of 1823, is therefore clearly inapplicable, and has no effect to take away the power of the secretary to contract.

It is equally true that the Statute of 1813 is not controlled by the Act of 1823.

In 1813, a statute was passed entitled "An Act, the better to provide for the supplies of the army, &c.," (2 Stat. at Large, 816, Ch. 48,) one object of which was *to provide for the subsistence of the army*, by purchase or contract, or by the use of supplies on hand, "*in all cases, where, either from any want of contractors, or from any deficiency on their part, or from any other contingency, such measures may be proper and necessary in order to insure the subsistence of the army or any part of it.*"

This is evidence of a clear intent that the subsistence of the army shall not be defeated by the want of contractors, or by an inability on their part to perform their contracts, or from any other contingency or disturbance.

The principles of construction relied upon, it is submitted, have been sustained by judicial authority.

In the case of *The United States* vs. *Jones*, 18 *How.* 92, the Government resisted an allowance of an advance of money, which had been made by the Secretary of the Navy, and relied, in part, upon the *Statute of Jan.* 31*st*, 1823. The Court made no reference to the statute, evidently regarding it inapplicable, and as having no bearing upon the authority of an executive department.

The statute of January 31st, 1823, was considered in an earlier case, *Williams* vs. *The United States*, 1 *How.* 296–7–8, and was evidently regarded as directory, and as applicable only to the disbursing officers of the Government, acting under a superior, such as the principal officer of a department. This statute was subsequently and quite recently relied upon for a similar purpose, in *The United States* vs. *Cutter*, 2 *Curtis*, 617, in which case it was limited in its operation to minor disbursing officers.

In the case of The United States vs. The Bank of the Metropolis, 15 Peters, the bills, which were the subject of adjudication, were made in 1835, and although not cited, it cannot be supposed that the Court

and counsel were ignorant of a statute which had been twelve years upon the Statute Book. Neither is it to be said that the Postmaster-General was not an officer of the United States; or that he did not use the public money.

The Court held it was public money. That the Postmaster-General had authority to make an advance to assist a contractor.

So far as the Statute of January 31, 1823, is relied upon by the defendants, this decision must be regarded, until reversed by the authority which pronounced it, as a conclusive answer.

The principles of the decision have been repeatedly recognized by this Court.

The United States vs. *The City Bank of Columbus*, 21 *How.* 365–6. "The Secretary of the Treasury has power to contract for the transmission of money from one point to another. Such power in the Secretary of the Treasury is necessary for the transaction of the business of the country, pervading as it does every part of the country."

Converse vs. *The United States*, 21 *How.* 471–3–4. This provision is in the annual appropriation for the army, &c.—and although the words are general and include officers in every branch, yet from the object of the law, the attention of Congress must have been mainly directed to officers in the military service, *who, from the position in which unforeseen events often place them, are called upon and are required to perform duties not specified by law or regulation*, but which grow out of and are associated with military service. The secretary is not bound to employ collectors of customs. He had a right, if he supposed the public interest required it, to have the service performed by a single agent. The law authorizes him to call upon the collectors; it evidently authorizes him to employ others. He was at liberty to employ a different agency whenever he supposed the public would be better served by this arrangement."

Luther vs. *Borden*, 7 *How.* 43–4–5. In this case the powers of the President in case of rebellion are discussed.

Martin vs. *Mott*, 12 *Wheat.* 19. In this case the military authority of the country is discussed.

Smith vs. *Washington*, 20 *How.* 148. Authority to repair a street gives authority to grade. Hills must be cut down, &c. The road must be graded. If the duty imposed on the corporation requires this to be done, the power must be coextensive with the duty.

4. There is no evidence in the record or finding of the Court, of any fraudulent arrangement between Russell, Majors & Waddell and the secretary, by which the contractors might obtain the money of the United States, at the time the acceptances declared upon were issued. So far as it appears, the sole object was to sustain the army in Utah. If any such fraud existed, it has not been brought home to the knowledge of the petitioner, who acted in good faith, throughout.

In the construction of statutes, the spirit, and not merely the language, is to be regarded; they are never to be construed so as to defeat the trusts and duties of the Government, unless they are incapable of any other construction; if they contravene constitutional rights of the executive, they are of no avail.

Faw vs. *Marsteller*, 2 *Cranch*, 10. Where a case is shown to be out of the mischief intended to be guarded against, or out of the spirit of the law; the letter of the statute will not be deemed so unequivocal as absolutely to exclude another construction.

In "*United States* vs. *Jones*, 18 *How.* 92," the Attorney-General relied upon the Statute of Jan. 31, 1823, as prohibiting the Secretary of the Treasury from advancing money. This construction was not adopted by the Court.

IX. The finding of the Court "That under the circumstances of the case, the Secretary of War had no authority to bind the United States by the acceptances in suit, and that they are not liable upon them," (Record, 74, 1st Ruling,) is erroneous.

CIRCUMSTANCES.

The country was in a state of war. (Proclamation of the President, supra.) The Secretary made a contract with Russell, Majors & Waddell, on 11th April, 1860, for transportation, during the years 1860 and 1861, which might extend to five millions of pounds. The means of transportation were to be submitted to the Government for inspection and acceptance; compensation to be made pro rata, as the train advanced. The parties reserved a right to change, alter, modify, or abrogate the contract, in whole or in part. Subsequently, this right to modify was exercised, and the parties entered into an arrangement that the Secretary should accept the bills of the contractors, when the trains were ready to start, when the contractor had nothing to do but to perform his service, having incurred all his expenses, which the Government by its contract were bound to pay unless the train was employed. An exigency existed in the affairs of the War Department growing out of the war in Utah. It was a bad season, the contracts were large, which required a very large outlay — no contractors who had money sufficient to make the necessary outlay and perform the service so promptly as it should have been done. Russell, Majors & Waddell had been large contractors with the Government, were prompt and reliable. Congress had made its usual and ordinary appropriations for the support of the army. The Treasury had money on hand. The trains which were ready to start, when the acceptances were made, in the absence of any finding by the Court to the contrary, must be presumed to have performed the service.

A. These are the circumstances. They commend themselves to the consideration of the Court. They show a contingency in the department, for which the Secretary was bound to provide. It was as competent for the Secretary to pay, or accept, after the contractors had provided their teams, and were ready to start, as it was to pay pro rata as the train progressed, or at the end of the transitus, by specie or drafts upon an Assistant Treasurer.

In 1813, a statute was passed entitled "An Act, the better to provide for the supplies of the army, &c.," (2 Stat. at Large, 816, Ch. 48,) one object of which was *to provide for the subsistence of the army*, by

purchase or contract, or by the use of supplies on hand, "*in all cases, where either from any want of contractors, or from any deficiency on their part, or from any other contingency, such measure may be proper and necessary in order to insure the subsistence of the army or any part of it.*"

B. The ruling of the Court of Claims upon this part of the case proceeded upon an assumption, that the acceptances were to be regarded as an evasion of the Act of 26th February, 1853. (Record, p. 69. Finding 6th.)

This statute was enacted as an addition to an Act of July 29th, 1846, entitled "An Act in relation to the payment of claims." The object of these statutes was to prevent officers of the Government and members of Congress from requiring an interest in claims upon the Government, adverse to the duties of their offices. Bills of exchange pass by a simple indorsement, or by delivery, are not claims, of the character, or in the sense of the term as used in these statutes.

X. The Court erred in its seventh ruling, (Record 74,) in which it is said the evidence failed to establish any usage or practice in the different departments of the Government, by virtue of which the Secretary of War was authorized to accept, and that if such usage or practice were established, it would not avail because forbidden by law.

A. This ruling is uncertain and leaves the question of usage open.

B. The Court find as matter of fact, from the testimony of Floyd, contained in his declarations to the petitioner, "*that it had been the custom of the department to give them (acceptances) in certain contingencies since the organization of the Government.* (*Record* 73.)

C. As already shown, bills of exchange have been used, from the establishment of the Government, and have been paid by direction of

Congress in many instances; this amounts to a legislative recognition, in this respect, of a custom, which the Court was bound to recognize, without receiving other proof to the contrary.

1 Stat. at Large, July 16, 1798, Ch. 86, Sec. 5, shows payment of a bill of exchange.

Edie vs. *East India Com'y*, 2 *Burrows* 1216, *Lord Mansfield, p.* 1120. "I thought at the trial that the defendant might be at liberty to go into the usage of merchants upon this occasion, (page 1122.) Since the trial I have looked into the cases, and have considered the thing with a great deal of care and attention, and thought much about it; and I am very clearly of opinion that I ought not to have admitted any evidence of the particular usage of merchants in such case. Of this I say, I am now satisfied, for the law is already settled. (Page 224.) The point now in question is already solemnly settled, by the two adjudications that have been mentioned; and therefore witnesses ought not to have been examined to the usage, after such solemn determinations of what was the law."

The payment of bills of exchange by Congress; the adjudication of this Court in the case of United States vs. the Bank of the Metropolis, bring the case at bar, within the principles and reasoning of the Court in the case cited, in which all the judges concurred.

The United States vs. *McDaniel*, 7 *Pet.* 14. "A practical knowledge of the action of any one of the great Departments of the Government, must convince every person that the head of a Department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; *but it does not follow that he must show a statutory authority for everything he does. No government could be administered on such principles.* The attempt to regulate by law the minute movements of every part of the complicated machinery of Government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out and limitations imposed on the exercise of its power, there are numberless things which must be done that can neither be anticipated nor defined and which are essential to the proper action of the Government. *Hence of necessity, usages have been established in every Department of the Govern-*

ment, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits; and no change of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions."

D. It is erroneous, because there is no statute, which, in terms or by necessary intendment, forbids the secretary to accept bills of exchange. The statutes under which he acts, in guarded terms, leave his discretion open, in this respect, so that no detriment shall come to the public service, in the branch under his charge.

XI. The Court erred in its eighth ruling, (Record 74,) in declining to pass upon the character of the instruments declared upon. The Court found as matter of fact, (Record p. 70,) that the bills were drawn, accepted and indorsed as set forth in the petition; *and that the petitioner became the holder and owner thereof by purchase.* He regarded them as bills, purchased and holds them as bills; their construction was a question properly before the Court of Claims.

XII. The ninth ruling of the Court, (Record 74,) that the claimant was affected with actual notice of the illegal character of the acceptances, and had only the rights of Russell, Majors & Waddell, was erroneous. The facts, as found by the Court, upon which this ruling was made are stated by the Court upon pages 72 and 73, of the Record, and consist exclusively of the declarations made by Floyd to the petitioner, which, it is submitted, do not sustain the ruling.

A. The petitioner is in possession of the bills; the Court found as matter of fact, (Record 70,) that he was a purchaser, in open market. The presumption, in the absence of clear proof to the contrary, upon which the petitioner may safely repose, is, that he is the holder, in good faith, for value. He was not bound to inquire beyond the face of the paper.

Arthurs vs. *Hart*, 17 *How.* 6, 15, 16. "A bona fide holder not bound to inquire as to consideration, and is not bound by the agreements between the drawer and acceptor. In an action upon a bill of exchange by a *bona fide* assignee against the acceptor, it is no defence that the bill was accepted in order to pay for a sugar mill which was defective; that the drawers of the bill had promised to put it in order and that the assignee of the bill knew these facts."

Townly vs. *Sumrall*, 2 *Peters*, 182. If the holder knew the drawee had no funds, it is not material, if he took the bill upon the faith of the acceptance.

Brown vs. *Wiley*, 20 *How.* 442. Parol evidence of an understanding between the drawer and payee calculated to vary the terms of the instrument not admissible.

Hoare and Al. vs. *Graham and Al.*, 3 *Camp.* 57. In an action on a bill of exchange or promissory note, the defendant cannot give in evidence a parol agreement entered into when it was drawn, that it should be renewed and payment should not be demanded when it became due.

Renner vs. *The Bank of Columbia*, 9 *Wheat*, 581, 587. "There is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence, to contradict or substantially vary the legal import of a written agreement."

Bank United States vs. Dunn, 6 Pet., 51, cited supra.

B. The facts relied upon by the Court of Claims, (Record, 70, 71,) totally fail to attach fraud, or privity of fraud upon the petitioner. Floyd said he had made the acceptances,—there was authority for their issue;—there had been a consideration for them,—they would be paid at maturity,—there had been an exigency in the department, &c. That he had, as the trains were ready to start, accepted 40 or 50 per cent, &c. That there were no contractors who had money sufficient to make the outlay and perform the service as promptly as it should be done. That the Government had to give them some aid, (that is accept after the train was ready to start.) The petitioner asked Floyd,

while your treasury is full of money, why not give them the money. He made an answer which was satisfactory to the petitioner, upon which he acted, and the Government has had the benefit of his money.

C. The contract between the Secretary and Russell, Majors & Waddell, 11th April, 1860, as altered and modified, and acted upon by the parties, was legal. The contractors had a right to receive and negotiate the bills.

D. The facts, as stated by Floyd, upon which the Court proceeded, have no application to the bill first declared upon.

XIII. Whether the instruments declared upon are bills of exchange or orders for the payment of money, intimated to the Government, as shown by their acceptance, the contracts have been performed, the money earned and improperly paid to the contractors.

A. The Court of Claims, *Record, p.* 71, find that the bills were accepted by the secretary, under an arrangement with the contractors. That the first several hundred thousand dollars were paid by the department; that subsequently the money earned under the contracts was paid to the contractors, with which they were to take up the bills in their own way. They have not taken them up—the Government should.

United States vs. *Bank of the Metropolis*, 15 *Peters*, 377. The principles which the Court adopted in this case, in relation to the bills which had been accepted, "upon condition the contracts be complied with," fully sustain the above position.

XIV. The judgment of the Court of Claims should be reversed, and a judgment directed, that the petitioner recover his debt, and damages for the detention of the money.

A. The claimant is entitled to interest *eo nomine*, from and after the maturity of the bills. It is submitted that every incident which by the law applicable to a contract, is a necessary intendment and deduction from the terms used, in contemplation of law, must be regarded as coming within the intention of the parties to the contract, and within its express stipulation.

Beers vs. *Haughton*, 9 *Pet.* 329, 356, 357. The recognizance of special bail being part of the proceedings on a suit, and subject to the regulation of the Court; the nature, extent, and limitations of the responsibility created thereby, are to be decided, not *by a mere examination of the terms of the instrument*, but by a reference to the known rules of the Court, *and the principles of the law applicable thereto.*

United States vs. *Gurney*, 4 *Cranch*, 333. The right to interest attaches to all contracts for the payment of money not paid at the day.

Brown vs. *Wiley*, 20 *How.* 447. When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts.

The Statute, *March* 3, 1863, extending the jurisdiction of this Court, which says no interest shall be allowed prior to the rendition of judgment, "unless upon a contract expressly stipulating for the payment of interest" was designed to apply only to those cases in which the party was not at the time of its passage entitled, under the law applicable to his contract, to demand interest as of right.

Any other construction of the provision must produce injustice, and will operate to take away rights existing in the claimant as holder of the bills declared upon. Bills of exchange, by the law merchant, are entitled to interest upon non-payment at maturity, and it may with propriety be urged that the statute was not intended to apply to such instruments, especially to such instruments which had previously matured. This view derives support from the fact that Congress, in making provision for the payment of bills of exchange has uniformly directed the payment of interest, including, in many instances, cost and exchange.

B. The claimant is entitled to damages arising from non-payment of the bills at maturity.

Cooper vs. *Waldegrave*, 2 *Beav.* 282. Upon the breach (non-payment of money,) the right to damages or interest immediately accrues.

Story vs. *Livingston*, 13 *Pet.* 371. This case recognizes a right to interest by way of damages.

Curtis vs. *Innerarity*, 6 *How.* 146, 154. Every country has established a certain measure of reparation for the *detention of money* not paid according to contract, which is usually calculated at a certain and legal rate of interest. Every one who contracts to pay money on a certain day knows that if he fails to fulfil his contract, he must pay the established rate of interest *as damages for his non-performance.* Hence it may be said that such is the implied contract of the parties.

Kendall vs. *Stokes*, 3 *How.* 87, 102. Recognizes the principle that in an action for the non-payment of money the party suing is entitled to damages equal to interest.

Thorndike vs. *The United States*, 2 *Mason*, 19, 20. Same doctrine.

Mills vs. *Bank of the The United States*, 11 *Wheaton*, 431. Same principle.

The principle of indemnity, to the extent of interest, damages and cost of protest, upon bills of exchange, drawn or accepted under the direction and usage of the several executive departments, not paid at maturity, must be considered the settled doctrine of the government, as evidenced by its constant and uniform course of legislative action; upon the faith of which, the claimant and others, by purchase or discount, have been induced to invest their money in such securities.

C. B. GOODRICH.

ACCEPTANCES OUTSTANDING,

UPON WHICH SUITS HAVE BEEN INSTITUTED.

Thomas W. Peirce,	$ 30,000
Peirce & Bacon,	100,000
Benjamin E. Bates,	15,000
Dover Five-Cents Savings Bank,	20,000
Langdon Bank, Dover, N. H.,	30,000
Cocheco Bank, Dover, N. H.,	25,000
Dover Bank, Dover, N. H.,	15,000
North Berwick Bank, Maine,	10,000
South Berwick Bank, Maine,	15,000
Duncan, Sherman & Co., New York,	20,000
Shoe and Leather Bank, New York,	25,000
E. D. Morgan & Co., New York,	20,000
Boatmans' Savings Institution, St. Louis,	45,000
Southern Bank, St. Louis,	40,000
Merchants Bank, St. Louis,	40,000
Franklin Savings Institution, St. Louis,	55,000
Lucius Hopkins, New York,	10,000
The Bank of St. Louis,	20,000
Bank State of Missouri,	75,000
Union Bank of Missouri,	75,000
Kreiger and Als., Trustees, St. Louis,	15,000
Farmers Bank, St. Louis,	20,000
People's Savings Institution, St. Louis,	10,400
	$670,400

Supreme Court of the United States.

No. 23.—DECEMBER TERM, 1868.

THOMAS W. PIERCE,

vs.

THE UNITED STATES.

ADDITIONAL BRIEF OF THE APPELLANT.

The petitioner will rely upon the following authorities in support of the positions in the original brief, numbered IV, VIII, IX, XI, and XII.

Murray vs. *Lardner*, (2 *Wallace Rep.*, 110.) Coupon bonds, of the ordidary kind, payable to bearer, pass by delivery. And a purchaser of them in good faith is unaffected by want of title in the vendor. The burden of proof on a question of such faith, lies on the party who assails the possession. The court approve *Goodman* vs. *Harvey*, (4 *Adolphus & Ellis*, 870,) and affirm *Goodman* vs. *Simonds*, (20 *How.*, 422.)

Bronson vs. *La Cross, &c., Com'y*, (2 *Wallace*, 283.) Parties holding negotiable instruments, are presumed to hold them for full value, and whether such instruments are bought at par or below it, they are, generally speaking, to be paid in full when in the hands of *bona fide* holders for value. If meant to be impeached, they must be impeached by specific allegations, distinctly proved.

Goodman vs. *Simonds*, (20 *How.*, 343, 364.) "Bills of exchange are commercial paper in the strictest sense, and must ever be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs." "The law encourages their use as a safe and

convenient medium for the settlement of balances among mercantile men; and any course of judicial decision calculated to restrain or impede their free and unembarrassed circulation, would be contrary to the soundest principles of public policy."

Bank of Pittsburg vs. *Neal*, (22 *How.*, 104, 108, 110.) Recognizes and adopts the same principle.

In this case, the effect of the words "second of exchange, the first unpaid," contained in a bill of exchange, was the subject of discussion, and it was holden that these words did not imply knowledge, on the part of the holder, that the bill was drawn in sets, or that it had been improperly or irregularly issued.

Commissioners of Knox county vs. *Aspinwall*, (21 *How.*, 539, 545.) "The bonds on their face import a compliance with the law under which they were issued, and the purchaser was not bound to look further for the evidence of a compliance with the condition to the grant of the power."

Moran vs. *Commissioners of Miami County*, (2 *Black*, 723.) "Corporations are as strongly bound as individuals are to a careful adherence to the truth, in their dealings with mankind, and they cannot, by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced." The court affirm the doctrine of the case last above cited.

Woods vs. *Lawrence County*, (1 *Black*, 386.) In a suit upon coupons by a *bona fida* holder, his right to recover is not affected by the fact that the railroad company sold the bonds at a discount of twenty-five per cent., contrary to the charter, which forbids the sale of them at less than their par value.

Van Hostrup vs. *Madison City*, (1 *Wallace*, 291,) Where authority is given to a city to take stock in a road, *provided*, the act be "on the petition of two-thirds of the citizens," this proviso will be presumed to have been complied with where the bonds show, on their face, that they were issued in virtue of an ordinance of council of the city making the subscription: the bonds being in the hands of *bona fide* holders for value.

Meyer vs. *City of Muscatine*, (1 *Wallace*, 385.) The last case approved. Same doctrine announced. The holder for value had a right to presume that all precedent necessary requirements had been complied with.

Mercer County vs. *Hacket*, (1 *Wallace*, 83.) Where a county

issues its bonds payable to bearer, and pledges its faith, credit, and property, under the authority of an act referred to on the face of the bonds by date for their payment, and those bonds pass, *bona fide*, into the hands of holders for value, the county is bound to pay them. No defence, that the act referred to on the face of the bonds authorized the county to issue bonds only, and subject to certain "restrictions, limitations, and conditions," which have not been formally complied with, nor that the bonds were sold for less than par, when the act authorizing their issue and referred to by date on the face of the instrument declared that they should "in no case" nor "under any pretence," be so sold. Corporation bonds payable to bearer have the qualities of negotiable instruments. (*Cases* 21 *How.*, 539 *and* 1 *Black*, 386, *affirmed.*

Broom's Legal Maxims, (427.) Where acts are of an official nature, or which require the concurrence of official persons, *a presumption* arises in favor of their due execution. Every thing is presumed to be rightly and duly performed until the contrary is shown.

428. *General presumption.* That a man acting in a public capacity is duly authorized so to do. *The presumption, omnia rite esse acta*, applies to the acts of private individuals.

429. Where a person is required to do an act, the not doing of which would make him guilty of criminal neglect of duty, it shall be intended that he has performed it, unless the contrary is shown.

Best on Presumptions, (*sec.* 53.) *Presumptio juris* that no person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law, *malum in se* or *malum prohibitum*, or even done any act involving civil penalty, such as loss of dower.

Sec. 57. All persons are presumed to have duly discharged any duty imposed on them by written or unwritten law. Public officers are presumed to do their duty.

Sec. 48. Presumptions are favored which tend to give validity to acts. ~~(*Swift vs. Tyson*, 16 *Peters*, 1.)~~

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Swift vs Tyson
16 Peters 1-

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